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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1618

HERBERT MARTIN GIMELSTOB, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY MEMORANDUM

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September 25, 1973

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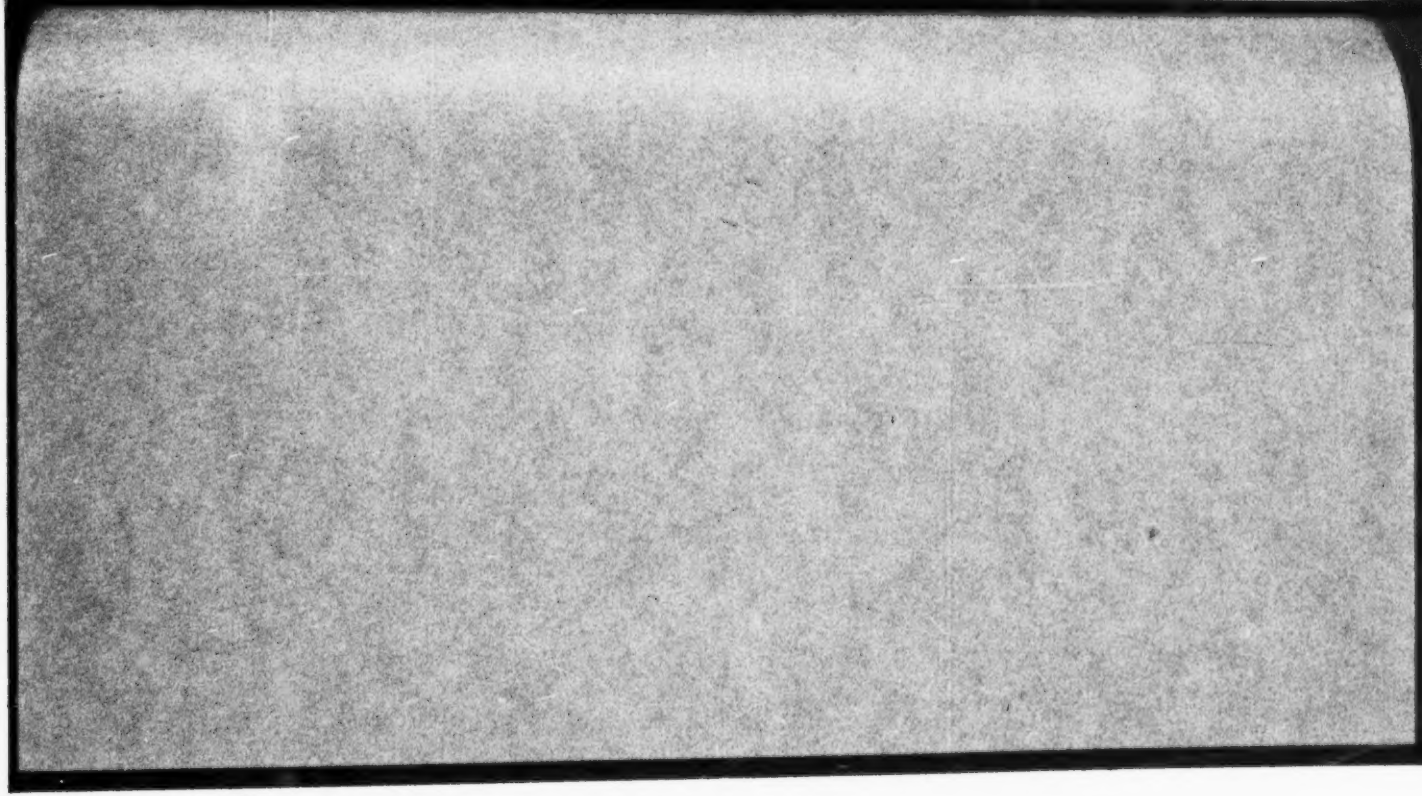

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In response to the Government's Brief in Opposition, the petitioner states as follows:

1. The Government acknowledges (Opp. Br. 7) that a conflict exists as to whether scienter is an essential element of proof under 18 U. S. C. §111, which penalizes one who "forcibly assaults, resists, opposes,

impedes, intimidates, or interferes with" federal officers engaged in performing official duties. But the Government asserts that the conflict arises only as to cases involving "special facts" where a defendant's resistance to arrest is a seemingly reasonable response to the acts of an unidentified officer.

The conflict cannot be that narrowly defined. The very case said by the Government to reveal the narrowness of the conflict, *United States* v. *Rybicki*, 403 F. 2d 599 (6th Cir. 1968), actually draws the line of conflict at those cases that do not involve offenses that "would have been crimes regardless of the person against whom they were committed." 403 F. 2d at 601-602. In other words, scienter is required by some Circuits in non-assault situations where the resistance or impediment or interference is a crime only because the identity of the federal officer is known. See *Burke* v. *United States*, 400 F. 2d 866, 868 (5th Cir. 1968).* The most obvious situation of that nature relates to a non-violent resistance or opposition to arrest. But the conflict in opinion is no less applicable to a non-violent interference in the form of a traffic violation, such as here occurred. That conflict deserves resolution by this Court.

2. In arguing that the tin ingots were still moving in foreign commerce when stolen, the Government

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* As explained in *Burke*, the conflict arises in cases relating to prohibited acts other than assault, where the accused person "forcibly resists . . . opposes, impedes, intimidates, or interferes with" the federal officer. In those situations, "it may well be that . . . it would be necessary for the court to charge the jury in terms that would make it essential to show that the accused person knew of the identity of the government official as such in order for him to be guilty of wilfully violating the statute." 400 F. 2d at 868.

relies (Opp. Br. 8-9) on *United States* v. *Yoppolo*, 435 F. 2d 625 (6th Cir. 1970), as indicative of the continuity of commerce until delivery to the ultimate consignee. But in *Yoppolo*, the so-called ultimate consignee, the Ohio Department of Liquor Control, had been named as the addressee on each case of the imported whiskey. 435 F. 2d at 626. In the instant situation, however, the only consignee identified in the bill of lading or elsewhere was Phillips Brothers. There was no proof of other parties having contracts for delivery of the ingots from Phillips. As far as the record indicates, the ultimate consignee was Phillips and, under the foreign commerce concept accepted by the Government, such commerce must have ceased when delivery was made to that sole consignee.

3. Finally, the Government asserts (Opp. Br. 11) that petitioner has made no showing that any conspiracy evidence introduced against him or his co-defendants was inadmissible for the purpose of proving the substantive counts of the indictment (constructive possession of the stolen tin and aiding and abetting in that possession). What the Government fails to point out, however, is that part of the conspiracy evidence admitted against the co-defendants and against the petitioner as co-conspirator was (1) testimony that one of the co-conspirators had threatened the life of another to keep him from revealing their criminal conduct; (2) testimony of prior crimes by some of the co-conspirators involving the same kind of criminal activity; and (3) testimony as to falsification of records by certain co-conspirators in order to conceal the criminal acts here involved. The Government relied on such evidence in the courts below to help sustain the finding as to a conspiracy.

The petitioner Gimelstob had no connection with those alleged actions, and such evidence was admissible as against Gimelstob only because he was an alleged co-conspirator during the trial. That evidence was not admitted as against Gimelstob on the substantive counts. And, once Gimelstob was acquitted of the conspiracy charge at the end of the trial, that evidence did not suddenly change its spots so as to become applicable to the substantive charges. The evidence had no relation to alleged possession. Only undue prejudice to petitioner could result from its use as to the substantive counts.

But the trial judge practically directed the jury to consider that conspiracy evidence in assessing Gimelstob's guilt under the substantive counts. He charged generally that the jury "may consider evidence that has been adduced as against Gimelstob with respect to the [possession and aiding and abetting] charges." Tr. 3572. No clearer showing could be had "of the improper use against him of conspiracy evidence introduced in relation to his co-defendants." (Opp. Br. 11).

The record, in short, is clear that the courts below did not take adequate steps to preclude the use of conspiracy evidence in assessing petitioner's guilt under the substantive counts. That failure conflicts with the standards promulgated by this Court in *Schaffer* v. *United States* 362 U. S. 511 (1960), and with the precise holding on virtually identical facts in *United States* v. *Patrisso,* 262 F. 2d 194 (2nd Cir. 1958).

CONCLUSION

For these reasons, supplementing those in the Petition, certiorari should be granted.

Respectfully submitted,

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